No. 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CARL F. GRUNENTHAL, *Petitioner*

v.

THE LONG ISLAND RAIL ROAD COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is printed at pages 9-18 of the petition. It is reported at 388 F.2d 480. The opinion of the United States District Court for the Southern District of New York, which is printed at pages 19-23 of the petition, is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 11, 1968. The petition for certiorari was filed on February 28, 1968. The respondent was granted an extension of time until April 29, 1968 in which to file this brief. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Does the Seventh Amendment preclude an appellate court from reversing a trial judge who abuses his discretion by refusing to order a new trial or remittitur of excessive damages?

(2) If not, does the Federal Employers' Liability Act, 45 U.S.C. § 51, restrict such appellate court action in cases brought under the Act?

(3) On the facts of this case, did the court below err in deciding that there was no rational manner consistent with the evidence by which it could arrive at an award in excess of $200,000 for the plaintiff?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the Constitution of the United States and Section 1 of the Federal Employers' Liability Act, 45 U.S.C. § 51, are set forth at pages 2-3 of the petition.

STATEMENT

The petitioner filed a complaint under the Federal Employers' Liability Act (hereinafter FELA) to recover $250,000 damages for personal injuries allegedly sustained in the course of his employment.

Trial was to a jury, but by stipulation the liability and damage issues were tried separately. The jury found against the respondent on the question of liability and subsequently returned a damage award of $305,000.

Following these verdicts, the respondent moved for a directed verdict or, in the alternative, for a new trial on the issue of liability. The respondent also attacked the jury's verdict on damages, contending that it was excessive and required a new trial or the acceptance by the petitioner of a remittitur. Both motions were denied, and judgment was entered on the verdict after the petitioner was allowed to amend his claim for damages from $250,000 to $305,000 to comprehend the jury's award.

The respondent appealed to the Court of Appeals for the Second Circuit upon the ground that the verdict was grossly excessive.[1] The Court of Appeals announced that it would apply its previously established standard in dealing with this claim. Thus, after "giving [the petitioner] the benefit of every doubt" it held that it could not "in any rational manner consistent with the evidence arrive at a sum in excess of $200,000" as compensation for the petitioner's injuries. Accordingly, the Court of Appeals ordered that the petitioner be given the option of remitting the part of his verdict that exceeded $200,000 or taking a new trial. The petitioner seeks review of this ruling.

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[1] The respondent raised other points for review which, having been decided against it by the Court of Appeals, the respondent no longer presses.

ARGUMENT

I

The petitioner's first two questions relate solely to the power of appellate courts, not trial courts, to order new trials or remittiturs.[2] He argues first that the Seventh Amendment prohibits federal appellate court review of a district judge's denial of a motion for a new trial based upon the excessiveness of a jury's verdict.

The Second Circuit's decision that it had power to reverse the District Court's denial of the respondent's motion for a new trial or remittitur finds direct support in the decisions of all eleven federal courts of appeals. And, contrary to the petitioner's contention, the exercise of this power is not inconsistent with any prior decisions of this Court.

In holding that the petitioner's verdict was excessive, the Court of Appeals stated that it was applying "the teaching of *Dagnello* v. *Long Island R.R.*, 289 F.2d 797 (2d Cir. 1961)." After an extensive analysis of the problem of appellate review of jury verdicts, the court in *Dagnello* announced the following standard:

> "If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is

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[2] The petitioner does not suggest that there is any lack of power generally in the federal courts to employ remittiturs to reduce a jury's verdict. The authority in this Court alone precludes him from making any such suggestion. Curtis Publishing Co. v. Butts, 388 U.S. 130, 160; Linn v. United Plant Guard Workers, 383 U.S. 53, 65-66; Neese v. Southern Ry., 350 U.S. 77; Affolder v. New York, C.&St.L.R.R., 339 U.S. 96; Dimick v. Schiedt, 293 U.S. 474, 484-85; Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 75; Northern Pac. R.R. v. Herbert, 116 U.S. 642, 646-47. See also Blunt v. Little, Fed. Cas. No. 1,578 (C.C.D. Mass. 1822) (Story, Circuit Justice).

> close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." 289 F.2d at 806.

Thus, in the instant case the Court of Appeals reversed the District Judge solely because his refusal to order a new trial or remittitur of the jury's verdict constituted an abuse of discretion.

All of the other federal circuits have affirmed their power to review a trial judge's refusal to order a remittitur or new trial when the jury has returned an excessive verdict, and they have applied a standard like that used by the Second Circuit in exercising this power. *See Boyle* v. *Bond,* 187 F.2d 362 (D.C. Cir. 1951); *Compania Trasatlantica Espanola, S.A.* v. *Melendez Torres,* 358 F.2d 209 (1st Cir. 1966); *Russell* v. *Monongahela Ry.,* 262 F.2d 349, 352 (3d Cir. 1958); *Virginian Ry.* v. *Armentrout,* 166 F.2d 400 (4th Cir. 1948); *Glazer* v. *Glazer,* 374 F.2d 390 (5th Cir. 1967), *cert. denied,* 389 U.S. 831; *Gault* v. *Poor Sisters of St. Frances,* 375 F.2d 539, 547-48 (6th Cir. 1967); *Bucher* v. *Krause,* 200 F.2d 576, 586-87 (7th Cir. 1952), *cert. denied,* 345 U.S. 997; *Bankers Life & Cas. Co.* v. *Kirtley,* 307 F.2d 418 (8th Cir. 1962); *Covey Gas & Oil Co.*

v. *Checketts*, 187 F.2d 561 (9th Cir. 1951); *Barnes* v. *Smith*, 305 F.2d 226, 228 (10th Cir. 1962).[3]

The petitioner does not even by implication dispute this unanimity in the courts of appeals, nor does he advance arguments based upon judicial policy or practice in support of his contention. Instead, he argues only that the "Courts of Appeals have unjustifiably assumed that this Court has receded from" its interpretation of the Seventh Amendment as set forth in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474.[4] But this Court did not rest its decision in *Fairmount* upon the Seventh Amendment. It noted:

> "Sometimes the rule has been rested on . . . the Seventh Amendment. . . . More frequently the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court." 287 U.S. at 482.

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[3] It has also been held that an appellate court may reverse a district judge for wrongfully compelling a plaintiff either to enter a remittitur or face a new trial. Steinberg v. Indemnity Ins. Co., 364 F.2d 266 (5th Cir. 1966).

[4] Petitioner also cites Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355, and Neese v. Southern Ry., *supra*. *Ellerman* merely held that on the facts presented it was error for the court of appeals to direct a verdict in opposition to that found by the jury. It did not hold a court of appeals may never award a judgment notwithstanding the verdict. *See* Neely v. Eby Const. Co., 386 U.S. 317. In *Neese* this Court assumed *arguendo* the existence of the power here in question. Such a decision hardly supports the petitioner's statement that *Neese* demonstrates that the unanimous view of the courts of appeals "has not been sanctioned by this Court."

Moreover, the power of a court of appeals to reverse a trial judge for an abuse of discretion was expressly left open in the *Fairmount* case:

> "It is urged that the refusal to set aside the verdict was an abuse of the trial court's discretion, and hence reviewable. *The Court of Appeals has not declared that the trial judge abused his discretion.* . . . Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion *we have no occasion to determine.*" 287 U.S. at 485 (emphasis supplied.)

Thus, the Court clearly did not hold in *Fairmount* that the Seventh Amendment or anything else absolutely barred enquiry into the trial judge's action.[5]

A decision of this Court rendered last term further illuminates the insubstantial nature of the petitioner's claim that the action of the Court of Appeals denied the petitioner his rights under the Seventh Amendment. In *Neely* v. *Eby Const. Co.*, 386 U.S. 317, 322, the Court announced, "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does. . . ." It follows that the Seventh Amendment does not distinguish between the power of trial and appellate courts with regard to questions of law. The Court of Appeals' determination in the present case was a ruling on "a question of law." *Dagnello* v. *Long Is. R.R.*, *supra* at 806. *See also Sunray Oil Corp.* v.

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[5] Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, is distinguishable on another ground. The court of appeals was reversed in *Fairmount* for employing an additur to increase the jury's verdict. Additurs were subsequently declared unconstitutional in Dimick v. Schiedt, *supra*.

Allbritton, 188 F.2d 751 (5th Cir. 1951) (concurring opinion). Thus, as in *Neely*, the petitioner's Seventh Amendment argument should be rejected.

II

In his next argument, the petitioner lays aside general principles of law and argues that an appellate court may not "interfere" with a jury's verdict on damages in cases brought under the FELA. None of the cases that the petitioner then cites, however, involved the power of an appellate court to order a remittitur; in each of the cases the question was whether a court had properly directed a verdict in favor of the defendant-employer. And this Court in deciding these cases did not lay down any distinction between trial and appellate courts.

In the present case, the Court of Appeals did not direct a verdict on damages; it held that absent a remittitur the petitioner would have to face a new trial before another jury. Moreover, the petitioner does not contend that the District Judge lacked power under the FELA to order a remittitur.[6] Thus, the cases cited

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[6] The continuous course of practice under the Act compels the petitioner's concession on this point. In Union Pac. R.R. v. Hadley, 246 U.S. 330, 334, this Court, in reviewing an FELA case in which both the trial judge and the appellate court had required remittiturs, unanimously held that, "the Court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high." *See also* Munson v. Long Is. R.R., 191 F. Supp. 748 (E.D.N.Y. 1961); Flusk v. Erie R.R., 110 F. Supp. 118 (D. N.J. 1953); Helsel v. Pennsylvania R.R., 84 F. Supp. 296 (E.D.N.Y. 1949); Fornwalt v. Reading Co., 79 F. Supp. 921 (E.D. Pa. 1948); Cunningham v. Pennsylvania R.R., 55 F. Supp. 1012 (E.D.N.Y. 1944); Jennings v. Chicago, R.I.&P. Ry., 43 F.2d 397 (D. Minn. 1930); Hammond v. Pennsylvania R.R., 15 F.2d 66 (W.D.N.Y. 1926), *aff'd*, 18 F.2d 1020 (2d Cir. 1927).

by the petitioner are distinguishable on two grounds: Those cases do not deal with the authority to order a remittitur, and they do not differentiate between trial and appellate court power.

The petitioner's cases, therefore, do not support the argument that the FELA imposes special limitations upon appellate power. Moreover, it is clear "that the system of judicial supervision still exists in [FELA] . . . as in other types of cases." *Harris* v. *Pennsylvania R.R.*, 361 U.S. 15, 17 (Mr. Justice Douglas, concurring). The courts of appeal apply precisely the same standard in reviewing jury damage awards in FELA actions as they apply in other civil actions generally. *See Boston & Maine R.R.* v. *Talbert*, 360 F.2d 286 (1st Cir. 1966); *Russell* v. *Monongahela Ry., supra; Thomas* v. *Conemaugh & B.L.R.R.*, 234 F.2d 429 (3d Cir. 1956); *Atlantic Coast Line R.R.* v. *Anderson*, 267 F.2d 329, 333 (5th Cir. 1959), *cert. denied*, 361 U.S. 841; *St. Louis S. Ry.* v. *Ferguson*, 182 F.2d 949, 954-56 (8th Cir. 1950); *Chicago. R.I.&P. Ry.* v. *Kifer*, 216 F.2d 753, 756-57 (10th Cir. 1954), *cert. denied*, 348 U.S. 917.

State appellate courts deciding FELA cases often order new trials or remittiturs of excessive verdicts. *Pitrowski* v. *New York, C.&St.L.R.R.*, 6 Ill. App. 2d 495, 128 N.E.2d 577 (1955); *Thompson* v. *Jason*, 265 S.W.2d 920 (Tex. Civ. App. 1954); *Louisville & N.R.R.* v. *Stephens*, 298 Ky. 328, 182 S.W.2d 447 (1944); *Sibert* v. *Litchfield & M. Ry.*, 159 S.W.2d 612 (Mo. 1942).

The authority is therefore clear that the FELA contains no special rule requiring appellate courts to distinguish FELA actions from all other civil cases with respect to their power to review a trial judge's

denial of a new trial motion based upon the excessiveness of the jury's verdict.

III

The petitioner's next argument is that "the verdict in the instant case is 'not without support in the record.'" Such an argument, of course, raises only a question of fact, and does not justify the petitioner's request for a writ of certiorari. Moreover, a brief review of the facts as stated by the lower courts reveals the correctness of the decision below.

At the time of the trial the petitioner was forty-five years old. He had worked for the railroad during his entire mature life and had received, including overtime, between $5,600 and $6,000 a year. While his right foot was severely injured, its removal has not been necessary, and he is not totally disabled. The petitioner himself testified at the trial that he has been engaged in part-time work as a custodian.

The District Judge admitted that the present discounted value of petitioner's future wages based upon a $6,000 salary would be about $100,000. Thus, even assuming, contrary to the petitioner's own testimony, that he was completely disabled from further employment, there remained a $205,000 excess, explainable for the most part by the jury's award of damages for pain and suffering. This is an extraordinary award for pain and suffering in an action not involving the loss of a limb or other more serious injury, and it justifies the Court of Appeals' judgment that the verdict was "grossly excessive" and not "in any rational manner consistent with the evidence." Indeed, the petitioner in his *ad damunum* clause asked initially for only $250,000.

Thus, even were the Court to reexamine the facts of this case, contrary to its usual practice under the writ of certiorari, it would find that the judgment of the Court of Appeals is fully supported by the record.

IV

The petitioner argues that it was error to order a retrial of the liability issue, as well as the damage issue, as an alternative to a remittitur. This contention, raised for the first time in this Court, plays upon what is at the most an ambiguity in the opinion of the Court of Appeals.

The petitioner did not argue below that the respondent was seeking two new trials, one on liability, the other on damages, merely because damages were excessive. Were the petitioner truly concerned about this issue, he would have raised the matter below in his brief on the merits or later in a motion for clarification of the Court of Appeals' opinion.[7] His failure to do so should not be relieved by a writ of certiorari. *Cf. Lawn* v. *United States,* 355 U.S. 339, 362 n. 32.

The respondent interprets the mandate below as requiring only a new trial on damages in the event that the petitioner refuses the remittitur. Thus, on the remand to the District Court that would follow a denial of certiorari both the petitioner and the respondent would urge the same construction of the Court of Appeals' mandate. There is accordingly no issue arising out of the construction of this mandate.

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[7] It is noteworthy that the dissenting judge below did not protest on this point. Had he agreed with the petitioner's characterization of the court's action, it is unlikely he would have remained silent.

CONCLUSION

The decision below is consistent with the authority of this and all other federal courts. The petitioner's contention that either the Seventh Amendment or the FELA bars appellate review is totally without support. His other contentions, which turn upon an investigation of the record and upon an interpretation of the mandate of the Court of Appeals, are without merit and do not in any case justify the issuance of a writ of certiorari. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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